

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 10-0153

STATE OF MONTANA,

Plaintiff and Appellee,

v.

ROBERT LOUIS LAMERE, JR.,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Eighth Judicial District Court,
Cascade County, The Honorable Kenneth R. Neill, Presiding

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STATEMENT OF THE ISSUES

Did the State act in an arbitrary or unfair manner by filing a Report of Violation immediately after probationer's substantial decrease in bail?

STATEMENT OF THE CASE AND FACTS

For the Court's convenience, the Statement of the Case and Facts has been summarized in the following timeline:

May 23, 2006 – Lamere sentenced to Montana Dept. of Corrections.
October 9, 2007 – Lamere was paroled.
February 21, 2008 – Lamere was transferred to probation.
January 12, 2009 – Lamere violated probation.
July 15, 2009 – Lamere's bail was reduced.
July 16, 2009 – State filed Report of Violation.
July 21, 2009 – County Attorney filed Petition for Revocation.
July 22, 2009 – Judge issued Bench Warrant.
July 24, 2009 – Lamere was arrested.
September 3, 2009 – Lamere filed Motion to Dismiss Petition.
September 9, 2009 – Lamere posted Bail.
January 19, 2010 – Hearing on Motion to Dismiss and Petition.
January 29, 2010 – Disposition Order re-sentencing Lamere.
March 26, 2010 – Lamere Filed Notice of Appeal.

On May 23, 2006, in the District Court of Great Falls, the Defendant/Appellant, Robert Louis Jr., Lamere, hereinafter "Lamere," was sentenced to the Montana Department of Corrections. (D.C. Doc. 140 at 4.) On October 9, 2007, Lamere was paroled. (D.C. Doc. 140 at 23.) Four months later, Lamere was transferred from parole to probation. (D.C. Doc. 140 at 4.)

On January 12, 2009, Lamere was arrested for violating the terms and conditions of probation. (D.C. Doc. 140 at 10.) Shortly thereafter, Lamere was

transported to the Cascade County Detention Center under the charge of probation violation and sexual intercourse without consent. (D.C. Doc. 140 at 11.) Initially, Lamere's bail was set at \$50,000. (D.C. Doc. 148 at 1.) However, after diligent efforts over the course of six months, Lamere's bail was substantially reduced to \$5,000 on July 15, 2009. (D.C. Doc. 148 at 2.)

Immediately following Lamere's bail reduction, the State filed a Report of Violation with the District Court of Great Falls. (D.C. Doc. 140 at 4.) The Report of Violation indicated Lamere had violated the conditions of probation six months prior, on January 12, 2009. (D.C. Doc. 140 at 4.) Five days later, the State filed a Petition for Revocation of Suspended Sentence. (D.C. Doc. 140 at 1.) The following day, July 22, 2009, the District Court issued a Bench Warrant. (D.C. Doc. 142 at 1.)

On July 24, 2009, Lamere was arrested pursuant to the Bench Warrant while in custody at the Cascade County Detention Center. (D.C. Doc. 142 at 3.) At Lamere's initial appearance, bail was set at \$10,000. (D.C. Doc. 144 at 1.) In August, pursuant to a stipulation, Lamere's bail in the amount of \$5,000 and \$10,000, were ordered to run concurrently. (D.C. Doc. 145 at 1.) On September 9, 2009, Lamere posted bail. (Tr. at 11.)

Lamere's court appointed defense counsel filed a Motion to Dismiss the Petition of Revocation, arguing the State violated Lamere's right to due process as

guaranteed by the United States and Montana Constitutions. (D.C. Doc. 148 at 1.)

On January 19, 2010, Lamere appeared in Cascade County Court for the purpose of a hearing regarding the Motion to Dismiss the Petition and for an evidentiary/disposition on the Petition for Revocation of Suspended Sentence.

(D.C. Doc. 172 at 1.) Counsel for Lamere argued that the State's six month delay in filing the Report of Violation, especially given the suspect timing of the State's filing, violated Lamere's constitutional right to due process. (Tr. at 10-12.) On January 29, 2010, the District Court denied Lamere's Motion to Dismiss and Lamere's suspended sentence was revoked. (D.C. Doc. 172 at 1-3.) Lamere was re-sentenced to the Department of Corrections for a period of 15 years, with 10 years suspended. (D.C. Doc. 172 at 3.) Lamere timely filed a Notice of Appeal on March 26, 2010.

STANDARD OF REVIEW

Whether a district court violated a probationer's constitutional right of due process involves a question of law and the review is plenary. *State v. Finley*, 2003 MT 239, ¶ 10, 317 Mont. 268, 77 P.3d 193.

SUMMARY OF ARGUMENT

The protection afforded by the due process clause of the United States Constitution and the Montana Constitution extends to probation revocation proceedings. Intrinsic to due process is the attribute of fairness. Lamere, who was

a probationer subject to revocation proceedings, had a right to be treated fairly by the State. The State, by initiating revocation proceedings based on Lamere's indigence and for no justifiable reason, treated Lamere in an arbitrary and unfair manner.

ARGUMENT

I. THE STATE VIOLATED LAMERE'S DUE PROCESS PROTECTION BY INITIATING A REVOCATION PROCEEDING IN AN ARBITRARY AND UNFAIR MANNER.

A. Due Process Protection Applies to Lamere's Revocation Proceeding.

The Due Process clause in the Fourteenth Amendment to the United States Constitution and Article II, Section 17 of the Montana Constitution protect substantive and procedural rights of persons faced with deprivation of life, liberty, or property by the government. *Finley*, ¶ 29. A revocation proceeding is not a criminal trial but a summary process to establish a violation of the conditions of the prisoner's probation. *Petition of Meidinger*, 168 Mont. 7, 15, 539 P.2d 1185, 1190 (1975). However, revocation of a suspended sentence can adversely implicate a probationer's liberty interests as seriously as the original determination of guilt. *Finley*, ¶ 29. Therefore, minimum requirements of due process are extended to revocation proceedings. *State v. Pedersen*, 2003 MT 315, ¶ 21, 318 Mont. 262, 80 P.3d 79.

In this case, Lamere was sentenced to the Department of Corrections. After serving almost 18 months in jail, Lamere was paroled and eventually transferred to probation. Thereafter, Lamere violated the conditions of probation. As a consequence, Lamere became subject to a revocation proceeding. Because Lamere was a criminal defendant subject to a revocation proceeding, Lamere had a right to due process protection.

B. Due Process Protection Requires the State to Treat Lamere With Fairness During a Revocation Proceeding and Keeping Lamere Imprisoned Based Solely on Lamere's Indigence Is Arbitrary and Unfair.

The underlying principal of due process is fundamental fairness. *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973). In addition, this Court has held the due process clause of the Montana Constitution requires the State to act with fairness before proceeding with revocation of a suspended sentence. *Petition of Meidinger*, 168 Mont. at 14-15, 539 P.2d at 1190. The idea being that fairness provides safeguards tailored to the particular demands of a revocation proceeding. *Finley*, ¶ 29. In summary, a revocation proceeding must be fair. *Finley*, ¶ 29. It must not offend the community's sense of fair play and decency. *Rochin v. California*, 342 U.S. 165, 173 (1952).

The United States Supreme Court found revoking probation because of indigence was too arbitrary and unfair to meet the confines of due process. In *Bearden*, a criminal defendant's probation was revoked automatically without

considering alternatives when the probationer, through no fault of his own, was unable to pay a fine. *Bearden v. Georgia*, 461 U.S. 660, 660-61 (1983). The Court held such a deprivation was fundamentally unfair and contrary to the fundamental fairness required by the due process clause of the Fourteenth Amendment. *Bearden*, 461 U.S. at 672-73.

This Court reached a similar conclusion. In *Farrell*, a criminal defendant was sentenced to 10 years in prison, with 10 years suspended, provided he complied with payment conditions relating to restitution and fines. *State v. Farrell*, 207 Mont. 483, 487, 676 P.2d 168, 171 (1984). The defendant was sentenced to 10 years in prison, the max sentence, because the trial court did not think the defendant could make good on the restitution and fines in less than 10 years. *Farrell*, 207 Mont. at 494, 676 P.2d at 174. On appeal, this Court thought it arbitrary and unfair to subject the appellant to the maximum sentence because of an unsupported notion he may not be able to pay the fine within 10 years. *Farrell*, 207 Mont. at 498, 676 P.2d at 176-77. The record indicated indigency may have been the criterion for imposing the sentence and this Court viewed the sentence as a possible infringement upon fundamental fairness. *Farrell*, 207 Mont. at 498, 676 P.2d at 176-77. Furthermore, this Court believed the defendant's due process rights may have been violated because indigence was a factor in sentencing. *Farrell*, 207 Mont. at 498, 676 P.2d at 176-77.

Bearden and *Farrell* suggest that a criminal defendant should not be incarcerated simply because he or she is poor; sentencing based on a probationer's indigence is contrary to the fairness requirement of due process. The commonality of *Bearden* and *Farrell* with this case is that Lamere's incarceration was prolonged because of his indigence. Admittedly, *Bearden*, *Farrell* and this case have varying fact patterns. However, because due process is a flexible concept, the facts of each case must be examined to determine the constitutionally required procedures.

State v. West, 2008 MT 338, ¶ 33, 346 Mont. 244, 194 P.3d 683 (citation omitted).

The method this Court has adopted for evaluating the constitutionality of a particular sentencing procedure is by questioning whether consideration of a defendant's financial background in sentencing or resetting a sentence is so arbitrary or unfair as to be a denial of due process. *Farrell*, 207 Mont. at 497, 676 P.2d at 176.

Examining the facts of this case, 184 days passed from when the State had knowledge of Lamere's probation violation and when the State filed the Report of Violation. The State could have filed the Report of Violation on any one of those 184 days. However, the State chose to wait. Lamere was in jail and bail had been set at \$50,000. Lamere, indigent, could not afford to post \$50,000 in bail.

After thirty days passed, Lamere remained in jail with a \$50,000 bail. The State took no action.

Sixty days passed and Lamere was still in jail with a \$50,000 bail. The State took no action.

The days continued to pass, day 90, day 120, day 150 and Lamere was still in jail with a \$50,000 bail. The State took no action.

Finally, on July 15, over 180 days later, one thing changed; Lamere's \$50,000 bail was substantially reduced to \$5,000, an amount Lamere could afford.¹

Immediately following Lamere's bail reduction, the State took action by filing a Report of Violation with the District Court. Prior to Lamere's substantial bail reduction, there was no pressing need for the State to take action. As such, the State took none. However, as soon as Lamere's bail was reduced to an amount he could afford, the State took direct action and filed a Report of Violation.

The State's decision to file the Report of Violation on July 16 was both arbitrary and unfair. The decision was arbitrary in the sense that it was not based on a legitimate reason; the decision lacked necessity. The Report of Violation contained nothing new. Each violation listed in the report of July 16 could have been listed on a report filed 6 months prior in January. In addition, the decision was unfair in the sense that the State took advantage of Lamere's indigence when it

¹ The fact that Lamere could afford to post \$5,000 in bail is a presumption based on the following logic: If Lamere could post a \$10,000 bail, which he did on September 9, 2009, then presumably, Lamere could afford to post a \$5,000 bail.

strategically postponed filing the Report of Violation in order to ensure Lamere remained incarcerated.

By doing so, the consequences were twofold. One, the State deprived Lamere of the opportunity to be with his family, to work, or to be placed in another Department of Corrections program. Second, the State disregarded the positive social policies associated with probation, such as rehabilitation, maintaining family structure, and avoiding recidivism.

Arbitrary and unfair are straightforward concepts. The United States Supreme Court found them in *Bearden* where a probationer was incarcerated because he was too indigent to pay a fine. *Bearden*, 461 U.S. at 672-73. This Court found them in *Farrell* where a probationer had received the max sentence because of his indigence. *Farrell*, 207 Mont. at 498, 676 P.2d at 176-77. This Court should find them again when applying its methodology from *Farrell* to the facts of this case.

CONCLUSION

Lamere does not dispute that the State has an interest in punishing individuals who violate the law. In addition, Lamere recognizes poverty does not immunize a criminal defendant from punishment. However, a criminal defendant's poverty should not be used as a tool against him for the purpose of incarceration. The State had a legal duty to treat Lamere with fairness. Because

the State's decision to wait and file the Report of Violation on July 16 was so arbitrary and unfair, as to be a denial of due process, the District Court's order re-sentencing Lamere should be vacated.

Respectfully submitted this ____ day of July, 2010.

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CERTIFICATE OF SERVICE

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 10,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

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APPENDIX

Disposition Order App. A

Oral Pronouncement of Sentence App. B